



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: American Modular Systems, Inc.

File: B-231842

Date: October 4, 1988

DIGEST

1. Protest of solicitation provision allowing for oral proposals concerns an alleged solicitation impropriety apparent on the face of the solicitation, and thus is untimely where filed after the closing date for proposals.
2. In reprourement for replacement of unsafe and inadequate buildings after default by the original contractor, it was proper for agency to solicit oral proposals from the next three lowest offerors in the original procurement, where there is no evidence that permitting oral proposals did not result in maximum practicable competition or generate lowest available price.
3. Where no apparent mistake exists in an oral proposal, award to another offeror on the basis of its low initial proposal is unobjectionable. Post-award allegation of mistake by second low offeror does not warrant disturbing otherwise proper award.

DECISION

American Modular Systems, Inc. (AMS), protests the award of a contract to Incon Building Systems under request for proposals (RFP) No. DAKF04-88-R-0021, issued by the Department of the Army's National Training Center at Fort Irwin, California, for modular buildings. We deny the protest.

The Army initially awarded a contract for the modular buildings in September 1987. When the original contractor defaulted, the contracting officer decided to repro cure by negotiation. Because the repro curement was considered urgent and it was determined that a written solicitation would unduly delay the acquisition the repro curement was orally solicited. Offers were solicited from the next three

C43464/156 998

low offeror under the original procurement, including AMS and Incon. On June 14, 1988, a written request for proposals was issued to document the oral solicitation. The closing date was set for June 17 at 4 p.m. and telegraphic and telephonic proposals were authorized. Offerors submitting proposals by telephone were required to promptly sign and submit complete copies of written proposals in confirmation of their telephonic responses by June 22.

AMS and Incon submitted their proposals by telephone on June 17. The agency reports that for each item in the solicitation schedule of supplies and services, AMS provided unit and extended prices, the contract specialist repeated back what she had been told for that item, and AMS then acknowledged that the figures were correct. Shortly thereafter, in reviewing the figures submitted by AMS, the contract specialist noticed that one unit price seemed too low and called AMS to verify it. AMS indicated that the figure was in error and provided the correct price, and the contracting specialist thereupon corrected the unit price and then verified with AMS that its total estimated price was \$3,758,025. Since, however, Incon had submitted the apparent low offer of \$3,731,994.47, and the agency had determined that negotiations would not be necessary, award was made to Incon based on its initial proposal on June 21.

AMS was advised on June 21 that award had been made to Incon at a total price of \$3,731,994.47. Although AMS did not raise the matter at that time, on June 22 AMS telephoned the contract specialist and claimed that an examination of its proposal had revealed an extension error with respect to item 0001, for 27 modular building units. Based on AMS' oral proposal, the contract specialist had recorded a unit price of \$43,785 for item 0001 (\$1,182,195 extended price). However, in the copies of its written confirmation (received by the agency on June 23), while AMS had indeed indicated an extended price of \$1,182,195 for item 0001, it had indicated a unit price of \$42,385. AMS claimed that the unit price of \$42,385, and not the extended price, was correct. That unit price would result in a total estimated price of \$3,720,225, making AMS the low offeror. On June 24, AMS filed an agency-level protest of the award to Incon; it then filed this protest with our Office on June 30.

AMS maintains that a mistake occurred in the oral communication of its offer, either by AMS' representative in stating it or by the contract specialist in transcribing it, and that its true offer is conveyed by its written proposal, corrected to reflect the proper extension of its intended unit price of \$42,385 for item 0001. AMS asserts that its written proposal, as corrected, should control because the

use of telephonic proposals was improper. AMS notes that the alleged mistake in its proposal would have been detected had the contract specialist waited for written confirmation of its offer before making award, as allegedly required.

AMS' protest against permitting the submission of oral proposals, as provided for in the solicitation, concerns an alleged solicitation impropriety and thus, to be deemed timely under our Bid Protest Regulations, had to be filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a) (1988); see Bellevue Bus Service, Inc., B-219814.3, Oct. 11, 1985, 85-2 CPD ¶ 407. This allegation therefore is untimely raised. In any event, we find nothing objectionable in the Army permitting telephonic offers. In the case of a repurchase after default, the contracting officer may "use any terms and acquisition method deemed appropriate for the repurchase" so long as competition is obtained to the maximum extent practicable, and the repurchase price is reasonable. FAR § 49.402-6(b); Arrow, Inc., B-231001, July 13, 1988, 88-2 CPD ¶ 44. There is no evidence, or reason to believe, that permitting oral proposals here did not result in award at a reasonable price on the basis of the maximum competition practicable under the circumstances. As a general matter, moreover, we find it untenable for AMS to argue that telephonic proposals should not have been permitted, in light of AMS' own decision to avail itself of this alternative.

Nor do we find anything objectionable in the Army's award to Incon on the basis of its initial oral proposal. There was no apparent mistake in AMS' oral proposal with respect to the unit and extended prices for item 0001; due to the nature of the oral proposal, the contract specialist had taken down AMS' quoted item and extended prices, verified them with AMS, and checked the arithmetic to ascertain that there was no extension problem. AMS thereafter even confirmed its total price when contacted for correction of one item price that was mistakenly low. The allegation of mistake was made by AMS only after the firm had been notified, on June 21, of the amount of the award to Incon. Thus, at the time of the award to Incon, the Army had no reason to believe that there was a mistake in AMS' oral proposal, or that AMS later might assert such a mistake.

Under these circumstances, the agency reasonably determined that Incon's proposed cost was lowest, and award based on Incon's initial proposal therefore was proper. See generally Kinton Inc., B-228260.2, Feb. 5, 1988, 67 Comp. Gen. ___, 88-1 CPD ¶ 112. There is no regulatory basis for a post-award claim of mistake by an unsuccessful offeror. See FAR § 15.607 (providing for correction of alleged mistakes

only prior to award); see generally Blosam Contractors, Inc., B-194566, Aug. 16, 1979, 79-2 CPD 125.

AMS argues that its written confirmation of its oral proposal should be viewed as controlling here. As indicated above, however, these confirmations were just that--they were not offers in themselves. We note in this regard that if AMS believed a written proposal was the proper means of presenting its offer, it was free to do so; telephonic offers were not required, they were merely one alternative. One offeror did in fact submit a written proposal 1 day prior to the June 17 closing date.

Since the protest is without merit, AMS' request for reimbursement of its attorney fees is denied. 4 C.F.R. § 21.6(d); Rezcorp, B-230260, June 14, 1988, 88-1 CPD ¶ 569.

The protest is dismissed in part and denied in part.

for *Simon E. Hinchman*
James F. Hinchman
General Counsel